SUNOCO ENERGY DEVELOPMENT CO.

IBLA 84-494 Decided December 11, 1984

Appeal from decision of the Utah State Office, Bureau of Land Management, readjusting coal leases U-089096 and U-092147 effective January 1, 1984.

Affirmed in part, set aside in part, and remanded.

1. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

   Notice of intent to readjust coal leases given to a lessee prior to expiration of the period allowed for readjustment is effective to permit readjustment although BLM does not provide the specific terms or conditions for readjustment until after the expiration of the period.

2. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

   Coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 become, at readjustment, subject to the requirements of that Act and regulations promulgated pursuant to that Act.

3. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

   A BLM decision to readjust the terms and conditions of a coal lease to include additional provisions is affirmed where the amendments are required by statute or regulation, or for purposes connected with proper lease administration. Provisions not having a basis in law or not shown to be reasonably necessary are disapproved, and leases remanded for appropriate amendment.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, and Robert W. Williams, Esq., Sunoco Energy Development Company, Lakewood, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On March 27, 1984, the Utah State Office, Bureau of Land Management (BLM), issued a decision effective January 1, 1984, readjusting coal leases

U-089096 and U-092147 issued, respectively, on July 1 and December 1, 1962, to a predecessor of Sunoco Energy Development Company (Sunoco). The leases are for lands located in Carbon County, Utah, and were issued subject to readjustment at the end of 20-year periods pursuant to the Mineral Leasing Act of 1920 (MLA), as amended, 30 U.S.C. § 207 (1982). On December 9, 1981, and April 9, 1982, notices of intention to readjust both leases were provided to Sunoco prior to the 20th anniversary of each lease. These notices informed Sunoco that the terms of the readjusted leases would be provided no later than 2 years from the date the notices were given. Within this 2-year period, on October 31, 1983, the readjusted lease provisions were supplied by BLM to Sunoco, which company then filed objections to the readjustment and to the proposed lease terms imposed by readjustment. BLM then issued its March 27, 1984, decision in response to Sunoco's protest, and this appeal was timely taken.

Sunoco's appeal challenges the readjustment and the rental and royalty provisions imposed by the readjusted lease on the grounds the readjustment was untimely made since new lease terms were not disclosed prior to the end of the 20-year term, and, consequently, the original leases are presumed by Sunoco to continue legally unchanged. Sunoco also argues that provisions of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. §§ 201-209 (1982), do not apply to these leases, and that, as result, the original lease terms prior to readjustment remain continuing contractual obligations of a commercial nature which bind the United States and do not become subject to regulations implementing FCLAA. Additionally, Sunoco raises specific objections independent of these two principal arguments directed against specific clauses of the readjusted leases. Those independent objections are discussed in specific detail later in this opinion. Sunoco's two principal arguments relating to readjustment and the applicability of FCLAA to the readjusted lease are first considered.

[1] Sunoco takes the position that readjustment was not timely because the readjusted lease terms to become effective January 1, 1984, were not provided with the notice of intention to readjust prior to the 20th lease anniversary. Since the decision in Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949 (10th Cir. 1982), reversing California Portland Cement Co., 40 IBLA 339 (1979), the Department has consistently taken the position that, prior to the end of the 20th year of a coal lease, notice of intention to readjust the lease is sufficient to permit readjustment of the lease terms; the specific lease provisions which are to comprise the readjusted lease may be later supplied, even following the expiration of the final year of the 20-year period. 43 CFR 3451.1(c)(2); see, e.g., Coastal States Energy Co., 81 IBLA 171 (1984); Gulf Oil Corp., 73 IBLA 328 (1983); Lone Star Steel Co., 71 IBLA 92 (1983); Coastal States Energy Co., 70 IBLA 386 (1983); Blackhawk Coal Co., 68 IBLA 96 (1982); Lone Star Steel Co., 65 IBLA 147 (1982). Since, therefore, in the case of both these leases, notice of intent to readjust was given prior to the 20-year anniversary date of each lease, BLM's timely notice conformed exactly to current Departmental regulations and satisfied the minimum requirements of law. See 43 CFR 3451.1(c)(2).

[2] Prior to its amendment in 1976, MLA provided, pertinently, regarding coal leasing: "[A]t the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as

the Secretary of the Interior may determine, unless otherwise provided by law." 30 U.S.C. § 207 (1958). Following amendment by FCLAA, 30 U.S.C. § 207(a) (1982) now reads, in pertinent part: "[T]erms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter."

This Board has ruled that FCLAA applies to leases such as these here on appeal which were in existence before enactment of FCLAA, in effect permitting the contractual rights under the original lease to be extinguished through application of the FCLAA amendments and implementing regulations. See Coastal States Energy Co., 81 IBLA at 173. As we pointed out in that decision at pages 173, 174: "A lessee simply has no vested right to the indefinite continuation of existing lease terms and conditions because to hold otherwise would negate the statutory reservation of the right to readjust."

Sunoco's arguments, therefore, based upon reasoning that relies upon the continued vitality of prior contractual provisions of these leases as they existed prior to the readjustment must fail. Both leases were readjusted timely, and both are subject to readjustment under FCLAA and regulations implementing FCLAA despite conflict between FCLAA regulations and the terms of the prior existing leases. Consequently, both Sunoco's arguments concerning the timeliness of readjustment and applicability of FCLAA to the readjusted leases are rejected. These leases, however, remain subject to administrative review to insure that the terms of the adjusted leases comply with the requirements of law and standards of reasonableness; that is, that they do not contain provisions which are unacceptable because they are arbitrary, capricious, or an abuse of discretion. See Lone Star Steel Co., 71 IBLA at 92, 93; Coastal States Energy Co., 70 IBLA at 386, 391.

[3] Sunoco objects to virtually every section of the readjusted leases, both of which contain identical provisions embodied into 30 sections, the last of which contains seven "special stipulations." Some of the lease provisions are required by regulation; for example, sections dealing with requirements for diligent development, continued operation, rental, production royalty, and readjustment of terms and conditions must be included in the lease. Coastal States Energy Co., 70 IBLA at 391. Therefore, those individual objections raised by Sunoco which are based upon arguments that readjustment was untimely, that regulations implementing FCLAA are not applicable to these leases or that previous lease provisions continue in effect to bar inconsistent provisions required by current regulations will not be discussed again in the context of objections raised to individual sections of the lease. Those arguments have been considered and are rejected. Sunoco does, however, raise a number of other independent reasons to support its arguments that some of the lease provisions are unacceptable.

At the outset of the attack upon specific lease provisions, Sunoco challenges the January 1, 1984, "effective date" set for the readjusted lease, contending the date cannot be set while an appeal is pending before this Board, since the matter is not yet finally decided. As a corollary to this argument Sunoco also urges that since the Attorney General of the United States has not conducted a review of the leases pursuant to 30 U.S.C.

§ 184(1)(2) (1982), the lease effective date cannot be determined. Identical objections were raised and decided in Gulf Oil Corp., 73 IBLA at 334:

> The regulations in effect at the time when appellant's leases were ripe for readjustment clearly and unambiguously provided that the readjusted terms shall become effective either 60 days after the lessee is notified of them, or 30 days after the authorized officer transmits the required information to the Attorney General, whichever is later. 43 CFR 3451.2 (1981). This 30-day period applies only when the authorized officer has required the lessee to furnish information specified in 43 CFR 3422.3-4 for review by the Attorney General. Nothing in the record indicates that any such request was made to Gulf, so this 30-day period is not applicable in determining the time when the readjustment became effective. * * *
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> Appellants contend that not until the regulations were amended in 1982 was it provided that "the effective date of the readjusted lease shall not be affected by the filing of objections to any of the readjusted terms and conditions." 43 CFR 3451.2(b) (1982). Although this was not explicitly stated in the prior regulations, they clearly provided that the readjustment would become effective 60 days after receipt of the notice. 43 CFR 3451.2(d) (1981). Contrary to the argument in appellants' statement of reasons, there was no explicit provision in the former regulation that filing objections to the readjustment would postpone the effective date.

BLM properly set January 1, 1984, as the lease effective date in the case of both leases.

Sunoco finds lease sections 1 "Statutes and Regulations," 3 "Diligent Development and Continued Operation," and 11 "Logical Mining Units," to be unacceptable because these provisions all incorporate provisions of future regulations "hereafter in force." Section 3 is also assailed because the regulatory definitions of "diligent development" and "continued operation" are said to be inconsistent with the statutory mandate of 30 U.S.C. § 207(a) (1982) that coal leases must produce "in commercial quantities at the end of ten years" or be terminated. Sunoco contends that, to comply with the Act, it should be sufficient for a lessee to commence production at the end of the ten-year period rather than to have achieved production of commercial quantities by that date. This exact question was decided contrary to appellant's position in Coastal States Energy Co., 70 IBLA at 386. The terms "diligent development and continued operation" were, on January 1, 1984, defined by regulations codified at 43 CFR 3480.0-5(a)(8) and (12) (1983). Since the regulations require production in "not less than commercial quantities" both the applicability and intention of the regulations are clear and may not be disregarded. See Coastal States Energy Co., 70 IBLA at 392.

Further, so far as concerns appellant's general objection to future regulations applicability, this Board has previously approved section 1 and similarly worded provisions which adopt the use of future regulations as provisions of coal leases. In this case, however, the situation is further

complicated since BLM indicates in its March 27 decision that it is rethinking the use of this language, and may, as a policy matter, decide not to continue to refer to regulations "hereafter in force" (Decision at 3).

Also related to this circumstance are appellant's objections to section 11. Appellant objects that this section, "Logical Mining Units," is internally inconsistent, since it does not conform to current regulations defining logical mining units, but at the same time purports to adopt the provisions of current regulations. As a result, as Sunoco contends, it is not possible to say with certainty whether these leases are each to be considered to automatically become a logical mining unit upon readjustment, or whether the provisions of 43 CFR 3480.0-5(a)(19) should control. If the latter position should be deemed correct (a conclusion which is consistent with prior decisions of this Board, cf. Lone Star Steel Co., 71 IBLA at 92), then BLM may wish to retain its present policy concerning regulations "hereafter in force." Clearly, however, there is now a conflict within section 11 and between section 11 and section 1. For these reasons, sections 1, 3, and 11 are remanded to permit BLM to conform these provisions of the lease to current regulations and, if a decision has been reached concerning the use of the "hereafter in force" language, either to delete that language, or to also amend sections 3 and 11 so that there will be no conflict between the expressed terms of the lease and regulations incorporated by reference. See, e.g., Coastal States Energy Co., 81 IBLA at 174, where remand was made for similar purposes.

Sunoco challenges section 4 "Bonding," contending the $5,000 bond requirement of the readjusted leases is "inordinate" (Statement of Reasons at 65). Sunoco argues that, in the absence of regulations setting out standards for setting bonds in coal leasing, the bonding requirement in this case is imposed arbitrarily, capriciously, and abuses the discretion of the Secretary. This argument would be more compelling were there an increase in the amount of the bond required following readjustment. Since the same amount of bond was required under the 1962 leases, however, it is difficult to see how the amount of the bond has now become "inordinate." While it may be, as appellant contends, that the better practice would be for the Department to establish detailed regulatory standards setting bond requirements, nonetheless there is some standard, since the bond amount is required by 43 CFR 3474.2(a) to be adequate to assure "compliance with all terms and conditions of the lease" except reclamation. The bond required for these leases has not been shown to be improper or unreasonable; accordingly, it is approved. (Cf. Coastal States Energy Co., 81 IBLA at 175, where a bond in the amount of $60,000 was approved as reasonable.)

Further, appellant's argument that the proviso of this section permitting an increase in bond amount is unreasonable is not persuasive. Whatever amount may be adequate to assure compliance with the lease requirements is ultimately a question of fact to be determined according to the circumstances of each lease. The contention by Sunoco, however, that a decrease in the bond amount should also be possible appears to be well taken and not contrary to law. Accordingly, the bonding provision should be amended by BLM on remand to permit adjustment of the bond amount to suit the individual circumstances of each lease.

Section 6 "Production Royalty," should, according to Sunoco, establish the minimum royalty rate for these leases for underground coal at 5 percent, rather than 8 percent of the value of the coal removed, under Departmental regulations 43 CFR 3473.3-2(a)(3) and 3451.2(a)(2). Regulation 43 CFR 3473.3-2(a)(3) provides: "A lease shall require payment of a royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the Minerals Management Service may determine a lesser amount, but in no case less than 5 percent if conditions warrant"; while 43 CFR 3451.1(a)(2) directs that: "Any lease subject to readjustment which contains a royalty rate less than the minimum royalty prescribed in § 3473.3-2 of this title shall be readjusted to conform to the minimum prescribed in that section." The apparent meaning of these provisions, construed together, is, according to appellant that, if the previous leases held by Sunoco provided for a royalty rate of less than 5 percent, then the readjusted leases royalty rates must be set at 5 percent for underground coal. Appellant relies for support for this argument upon the preamble to the publication of regulations appearing at 47 FR 33132 (July 30, 1982) which comments, pertinently, concerning subpart 3473, "[t]here is still an initial royalty rate floor of 5 percent for underground mined coal." This argument seeks to carve out an exception to the general rule previously announced by this Board in Blackhawk Coal Co., 68 IBLA 96 (1982), construing this lease provision so as to exclude the possible interpretation advanced by Sunoco in this appeal.

In Blackhawk, supra, the production royalty provision was defined to mean that, at the time of readjustment, the royalty rate for underground coal was to be set at 8 percent subject to temporary reduction at any time later upon a satisfactory showing to justify the lower rate. The Blackhawk decision explains:

> Appellant contends that it is arbitrary and capricious to designate a royalty rate by regulation without assessing a company's economic capability to support such a rate. Appellant points to 43 CFR 3473.3-2(a)(1) which states that royalty rates shall be determined on an individual case basis prior to lease issuance, citing Rosebud Coal Sales Co. v. Andrus, No. C79-160B, slip op. at 15-16 (D. Wyo. 1980), aff'd, 667 F.2d 949 (10th Cir. 1982). Appellant contends that in proposing the 8 percent production royalty, the Department has given no consideration to variations in mining conditions, geography, labor markets, or transportation.
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> * * * Departmental regulation 43 CFR 3473.3-2 provides two ways of granting underground coal lessees relief from the statutory 12-1/2 percent royalty. Subsections (a)(1) and (a)(3) implement 30 U.S.C. § 207(a) (1976), and provide that a rate as low as 5 percent may be determined at lease issuance. Alternatively, the Department may establish a royalty rate in the lease and provide relief after lease issuance upon application of the lessee under subsection (d), which implements 30 U.S.C. § 209 (1976). Appellant has not persuaded us that it is unreasonable to establish an 8 percent royalty rate in the lease now, since the rate may temporarily be reduced later if conditions warrant. If a lower rate is put into the lease now and economic conditions

> change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment. The method chosen by BLM thus assures the United States a fairer return over the life of lease, provides appellant some relief from statutory 12-1/2 percent rate, yet affords appellant an opportunity for further royalty relief when it is really needed. We previously have affirmed BLM decisions denying special royalty relief at lease readjustment, requiring lessees to seek such relief under 43 CFR 3473.3-2(d).

68 IBLA at 99.

Subsequent decisions of this Board have followed the Blackhawk rule. See Coastal States Energy Co., 81 IBLA 171 (1984); Coastal States Energy Co., 70 IBLA 386 (1983), appeal pending, Coastal States Energy Co. v. Watt, Civ. No. C 83-0730 J (C.D. Utah filed June 3, 1983). (But cf. FMC Wyoming Corp. v. Watt, 587 F. Supp. 1545, rev'g FMC Corp., 74 IBLA 389 appeal pending, United States v. FMC Wyoming Corp., Civ. No. 84-2175 (10th Cir. filed July 29, 1983), holding it was arbitrary and capricious to impose a 12-1/2 percent royalty rate upon lease readjustment without consideration of the individual lessee's circumstances.) The Board adheres to the position established by the Blackhawk decision and rejects appellant's argument that exceptions to the regulatory norm for royalty rates should be considered at the time of readjustment.

Sunoco would find section 13 "Authorization of Other Uses and Disposition of Leased Lands," which permits other uses of these leased lands not inconsistent with Sunoco's mining operation, to be overbroad. Concerning this section, in addition to other arguments previously considered, Sunoco argues that any authorization of other uses of the leased lands is inconsistent with the leases. A similar argument was rejected in Coastal States Energy Co., 81 IBLA at 177, where it was observed that this provision "is fully consonant with the multiple use provision of FLPMA." Here, as in that case, it must be concluded this lease provision is properly included in the leases.

Sunoco objects to sections 16 and 17 relating to employment and monopoly practices because the provisions fail to repeat, in identical language, limiting provisions of 30 U.S.C. § 187 (1982) dealing with cases of conflict between these provisions and state law. These lease provisions are, however, required by law and sufficiently conform to the statutory mandate. Failure to include statutory language reciting that the lease provision will not operate to impair state law is not necessary for two reasons: First, Sunoco has not shown any such conflict to exist, and second, the statute continues in force, and will, if applicable to any operation conducted under these lease stipulations, operate without incorporation into the lease. See 30 U.S.C. § 187 (1982); Coastal States Energy Co., 81 IBLA at 177.

Appellant contends Section 25 of the lease is unacceptable because it establishes a no-fault liability standard for the lessee. This contention is correct. Section 25 was found to be flawed for this reason in Coastal States Energy Co., 81 IBLA at 178. In this case also, remand of this section

to BLM is required to eliminate the provisions of section 25(c) stating that "liability without fault" may be imposed upon the lessee.

As to the final lease provisions, section 30 "Special Stipulations," Sunoco contends these provisions, consisting of seven numbered subsection, are not properly made part of the lease, but should be reserved for inclusion in specific mining plans. However, no examples of conflict between these special stipulations and any prospective use of the leased lands is suggested. As a result, it must be concluded this objection is without basis. As was previously stated in this opinion, these provisions, like the rest of the lease, are not required to conform to provisions of the previous lease agreement, and inconsistencies between the prior and present terms do not result in a conflict.

Appellant also objects that special stipulations 2 through 7 are redundant of provisions of applicable law and need not be repeated here. Assuming this to be the case, it is not a defect which requires removal of these sections, since the incorporation of such terms into the lease serves merely to add remedies for violation of these specified lease terms to remedies also available under statute and regulation. See 30 U.S.C. § 187 (1982); Gulf Oil Corp., 73 IBLA at 332, 333.

Sunoco wishes to delete the terms "mine plan area" and "exploration plan area" used in special stipulation 4, charging that the use of these words could reasonably be construed to require a general cultural survey of the entire leased area in the context in which they are used, and could result in a survey which much exceeds the extent of the ground actually used by mining. Since, however, this provision merely states a requirement for cultural survey of "affected" areas, the question of the exact extent of any survey is left to be handled in specific detail when a mining plan is prepared. Since the provision does not require a general survey, but only a survey of areas affected by mining, Sunoco's objection is premature and must be rejected.

Objections are taken against two provisions of special stipulation 6. First, the requirement that there be an intensive animal and plant inventory before taking any action to "disturb the surface" is said to be overbroad and also said to fail to recognize current usage of the property. Neither appellant's statement of reasons nor any part of the record on appeal, however, indicates what the current usage is. Certainly, no provision of the readjusted lease should prohibit an existing approved use in a manner which would invalidate the readjustment. In the absence of any showing to establish the existence of a condition of the sort envisioned by appellant, however, this argument must be rejected as without foundation in fact.

Sunoco's second point concerning special stipulation 6 concerns the use of the term "migratory species of high federal interest" (emphasis supplied) which is included in the list of animals which must be surveyed by the lessee prior to beginning work. The term is not defined further by the stipulation, nor, apparently, is the term or the emphasized portion of the term defined elsewhere in the lease. While there no doubt is a category of migratory animals which are of high Federal interest, the animals which comprise that category should be specified so that the lessee can know what species it must look for in making its survey. It should not have to guess at a definition. On remand, BLM should specify what is intended to be indicated by this term.

Finally, appellant raises questions concerning Special Stipulation 7, which requires conformity to standards for powerline construction to limit danger to raptors as set out in a University of Minnesota monograph which is not included in the record. Sunoco suggests, but does not state, that this cited publication may conflict with surface mining regulations or other agency requirements for powerline construction. In the absence of a showing that there is an actual conflict between the monograph and other applicable standards for powerline construction, this objection is denied. To the extent also that other arguments raised by Sunoco have not been specifically addressed by this opinion, those arguments have been considered and are rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside in part and the case files are remanded to BLM for further action consistent with this opinion.

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Franklin D. Arness
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Gail M. Frazier
Administrative Judge